

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

July 5, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

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No. 94-2894-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GEORGE SMITH,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Sullivan, Fine and Schudson, JJ.

FINE, J. This appeal presents an issue of first impression: May a defendant challenge on appeal a voluntary *Alford*-type plea to a crime even though an element of the crime is a legal impossibility, when the defendant knows of that legal impossibility prior to entry of the plea? We conclude that the answer to this question in Wisconsin is “no.”

George E. Smith appeals from a judgment convicting him of “child enticement,” see § 948.07(1), STATS., and from the trial court's order denying his motion for postconviction relief. The judgment was entered on Smith's *Alford*-type plea. See *North Carolina v. Alford*, 400 U.S. 25 (1970) (In a capital case, the constitution is not violated when a defendant accepts conviction even though he or she simultaneously claims to be innocent.); *State v. Garcia*, ___ Wis.2d ___, 532 N.W.2d 111 (1995) (*Alford*-type pleas may be accepted in Wisconsin). The only issue on appeal is whether Smith should be permitted to withdraw his plea.

I.

The criminal complaint charged Smith with violating § 940.225(2)(a), STATS., by sexually assaulting sixteen-year-old Tiffany B. in his car after he had picked her up from the high school she was attending.¹ The complaint alleged that Smith was the boyfriend of Tiffany's aunt. It also alleged that he forcibly and without Tiffany's consent fondled and digitally penetrated her.

The case was plea-bargained, and Smith waived his right to a preliminary examination under § 970.03, STATS. This is how the deal was ultimately described to the trial court by the prosecutor:

I have filed an amended information with the Court, served a copy on the defense, which charges the defendant with a different Class C felony than the second degree sexual assault that he was originally charged with. It charges him with child enticement.

¹ Section 940.225(2), STATS., provides:

(2) SECOND DEGREE SEXUAL ASSAULT. Whoever does any of the following is guilty of a Class C felony:

(a) Has sexual contact or sexual intercourse with another person without consent of that person by use or threat of force or violence.

It's my understanding that the defendant is going to plead guilty to that. It's my understanding that his plea is going to be [an] Alford one denying that this occurred but granting that the State has sufficient evidence to convict him and wishing to take advantage of the State's offer to resolve this case in this way.

The prosecutor also explained that the State had promised to recommend to the trial court that it sentence Smith to an eight-year term of incarceration that would run concurrently with the sentence that Smith was expecting to receive as a result of the revocation of his parole from his sentence for three bank robberies.

The amended information charged Smith with violating § 948.07(1), STATS., in the following manner:

On December 7, 1993, at 4829 North Iroquois Street, City of Glendale, with intent to have sexual intercourse and/or contact with a child, did cause a child who had not attained the age of 18 years, to wit: Tiffany [B.] (d/o/b 6/8/77), to go into any vehicle or secluded place, contrary to Wisconsin Statutes section 948.07(1).

Section 948.07(1) provides:

Child enticement. Whoever, with intent to commit any of the following acts, causes or attempts to cause any child who has not attained the age of 18 years to go into any vehicle, building, room or secluded place is guilty of a Class C felony:

(1) Having sexual contact or sexual intercourse with the child in violation of s. 948.02.

Section 948.02, STATS., referenced in § 948.07(1), requires, at the very least, that the child be younger than sixteen years old.² The prosecutor explained to the trial court at the sentencing hearing that Smith found a plea to child enticement “more palatable” than a plea to second-degree sexual assault “even though it carries the same penalty and essentially is still a sex charge.”

After hearing a poignant statement from Tiffany's mother, who explained how Tiffany was devastated by the assault and its aftermath, the trial court imposed a ten-year sentence of incarceration—two more years than the prosecutor had recommended. The trial court did, however, order that the sentence run concurrently with the sentence Smith would receive as a result of the revocation of his parole.

² Section 948.02, STATS., provides:

Sexual assault of a child. (1) FIRST DEGREE SEXUAL ASSAULT. Whoever has sexual contact or sexual intercourse with a person who has not attained the age of 13 years is guilty of a Class B felony.

(2) SECOND DEGREE SEXUAL ASSAULT. Whoever has sexual contact or sexual intercourse with a person who has not attained the age of 16 years is guilty of a Class C felony.

(3) FAILURE TO ACT. A person responsible for the welfare of a child who has not attained the age of 16 years is guilty of a Class C felony if that person has knowledge that another person intends to have, is having or has had sexual intercourse or sexual contact with the child, is physically and emotionally capable of taking action which will prevent the intercourse or contact from taking place or being repeated, fails to take that action and the failure to act exposes the child to an unreasonable risk that intercourse or contact may occur between the child and the other person or facilitates the intercourse or contact that does occur between the child and the other person.

(4) MARRIAGE NOT A BAR TO PROSECUTION. A defendant shall not be presumed to be incapable of violating this section because of marriage to the complainant.

(5) DEATH OF VICTIM. This section applies whether a victim is dead or alive at the time of the sexual contact or sexual intercourse.

The trial court sentenced Smith on March 2, 1994. On July 29, 1994, Smith filed a motion to withdraw his plea. He claimed that he “did not understand the nature of child enticement,” and that there was no factual basis for the plea because Tiffany was not younger than sixteen years at the time of the event underlying the amended charge. As noted, the trial court denied Smith's motion. Although Smith's motion raised other issues, the only issue that he pursues on this appeal is whether there was a factual basis for the plea.

II.

Although the Wisconsin Supreme Court once condemned, appropriately and accurately in this writer's view, some plea bargaining as a “direct sale of justice,” *Wight v. Rindskopf*, 43 Wis. 344, 354 (1877) (dismissal of charges in one case without court approval in return for testimony in another case), *motion for rehearing overruled*, 43 Wis. 358 (1877), it has now wholly and unequivocally embraced the practice. *Garcia*, ___ Wis.2d at ___, 532 N.W.2d at 115.³ We are bound by decisions of the Wisconsin Supreme Court.⁴ We are also

³ The concurrence notes that it has “difficulty concluding that the Wisconsin Supreme Court ‘has now wholly and unequivocally embraced the practice’ of plea bargaining; the dissent opines that the supreme court has not done so. The writer of this opinion cannot read *Garcia*'s statement that plea bargaining is an “‘important component[] of this country's criminal justice system,” *State v. Garcia*, ___ Wis.2d ___, ___, 532 N.W.2d 111, 115 (1995) (citation omitted), in context of the decision and its result, as anything but an unequivocal embrace.

⁴ The writer of this opinion reiterates his view that plea bargaining is a blot on the criminal justice system and everything for which it is supposed to stand. One of the concurring justices in *Garcia* recognizes that “[t]he dual aim of our criminal justice system is ‘that guilt shall not escape or innocence suffer.’” *Garcia*, ___ Wis.2d at ___, 532 N.W.2d at 120 (Wilcox, J., concurring) (quoting *United States v. Nobles*, 422 U.S. 225, 230 (1975) internal citation omitted). As this writer has pointed out elsewhere in some detail, plea bargaining runs counter to *both* of these worthy goals. First, it permits the guilty to avoid responsibility and just punishment for their crimes. Plea bargaining thus encourages crime. Further, criminals who get unjustified leniency as the result of their plea-bargained deals are freed from prison earlier than they would have been, or are not even sent to prison at all. Plea bargaining thus permits criminals to commit more crimes and hurt more victims. Second, plea bargaining tends to extort guilty pleas (or their equivalents) from the innocent. RALPH ADAM FINE, *ESCAPE OF THE GUILTY* 16–111 (1986); Ralph Adam Fine, *Plea Bargaining: An Unnecessary Evil*, 70 MARQ. L. REV. 615 (1987). Moreover, and equally serious, plea bargaining permits many victims to believe that the legal system does not appreciate their suffering by sending the message to them and to society that some crimes simply do not count. *See, e.g.*, Fine, 70 MARQ. L. REV. at 616–618 n.7. In this writer's view, the Wisconsin Supreme Court

bound by decisions of this court that do not conflict with decisions by the supreme court. See § 752.41(2), STATS. (“Officially published opinions of the court of appeals shall have statewide precedential effect.”). We conclude that as a natural corollary to *Garcia*, which permits defendants in this state to accept conviction while simultaneously proclaiming their innocence, and in light of *State v. Harrell*, 182 Wis.2d 408, 513 N.W.2d 676 (Ct. App. 1994), *cert. denied*, 115 S. Ct. 167, which rejected a challenge to a plea-bargained plea under circumstances similar to those here, defendants may not challenge a knowing and voluntary *Alford*-type plea on the ground that an element of the crime to which they have pled is a legal impossibility as long as they knew that at the time they entered their plea.

After sentencing, a defendant may not withdraw a guilty plea unless he or she shows that withdrawal “is necessary to correct a manifest injustice.” *State v. Lee*, 88 Wis.2d 239, 248, 276 N.W.2d 268, 272 (1979). This standard applies to “no contest” pleas, *Harrell*, 182 Wis.2d at 414, 513 N.W.2d at 678, and to *Alford*-type pleas, *State v. Johnson*, 105 Wis.2d 657, 666–668, 314 N.W.2d 897, 902–903 (Ct. App. 1981); *see also Garcia*, ___ Wis.2d at ___, ___, 532 N.W.2d at 113, 118–119. Post-sentencing withdrawal of a plea must be permitted when there is not a “sufficient factual basis” for the plea. *State v. Harrington*, 181 Wis.2d 985, 989, 512 N.W.2d 261, 263 (Ct. App. 1994). “Where the trial court has determined that there is a sufficient factual basis for acceptance of a plea, [an appellate court] will not upset that determination unless it is ‘clearly erroneous.’” *Ibid.* (citation omitted).

The rule in the plea-bargaining context is different than that recognized by *Harrington*. See *Broadie v. State*, 68 Wis.2d 420, 423–424, 228 N.W.2d 687, 689 (1975) (Where “the guilty plea is pursuant to a plea bargain, the

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should seek to limit plea bargaining in this state, as it is empowered to do, *see* § 751.12, STATS.; *Adoption of Plea Agreement Rules*, 128 Wis.2d 422, 383 N.W.2d 496 (1986); *State v. Kenyon*, 85 Wis.2d 36, 45, 270 N.W.2d 160, 164 (1978) (“Prosecutorial discretion to terminate a pending prosecution in Wisconsin is subject to the independent authority of the trial court to grant or refuse a motion to dismiss ‘in the public interest.’”), rather than issue panegyrics in its support. Additionally, giving a defendant what *Garcia* terms the “valuable option” of accepting conviction even though he or she claims innocence, *Garcia*, ___ Wis.2d at ___, 532 N.W.2d at 115, has an Alice-in-Wonderland ring to it. Nevertheless, as a judge of this intermediate appellate court, the writer must, appropriately, accept the rulings issued by those who sit on courts of superior jurisdiction. See *Hutto v. Davis*, 454 U.S. 370, 374–375 (1982) (*per curiam*).

court need not go to the same length to determine whether the facts would sustain the charge as it would where there is no negotiated plea.”). Although “manifest injustice” results when a plea-bargained plea is not entered “knowingly, voluntarily or intelligently,” *Harrell*, 182 Wis.2d at 414, 513 N.W.2d at 678, a defendant may not challenge on appeal a knowing, voluntary, and intelligent plea made to a charge as long as there is a factual basis “for *either* the offense to which the plea is offered or to a more serious charge *reasonably related* to the offense to which the plea is offered ... *even when a true greater- and lesser-included offense relationship does not exist*,” *id.*, 182 Wis.2d at 419, 513 N.W.2d at 680 (emphasis added).

In *Harrell*, the information originally charged the defendant with four counts of first-degree sexual assault of a child, under § 948.02(1), STATS. *Id.*, 182 Wis.2d at 413, 513 N.W.2d at 677–678. The case was plea-bargained, and the defendant pled no contest to one count of second-degree sexual assault of a child, under § 948.02(2), STATS., and to one count of third-degree sexual assault, under § 940.225(3), STATS.⁵ *Ibid.* The victim was eleven years old when she was assaulted, and Harrell argued on appeal that he should be permitted to withdraw his plea because there was no factual basis for it—that is, there was nothing in the record on the issue of consent. *Id.*, 182 Wis.2d at 416, 513 N.W.2d at 679.⁶ Here, in contrast to *Harrell*, the record is not only devoid of a factual basis for an element of the crime to which the defendant has pled, but, based on the facts, the crime is also a legal impossibility. Yet, for the purpose of this appeal, we perceive no principled distinction between the two circumstances, as long as the defendant's plea was knowing, intelligent, and voluntary.

Although Smith testified at the postconviction hearing that he did not know that he was entering his plea to an offense that was a legal impossibility, his trial lawyer testified to the contrary. Smith's trial lawyer told the trial court that he “went over in detail” with Smith the enticement charge, and pointed out to Smith that “encouraging somebody to come into your car”

⁵ Section 940.225(3), STATS., provides:

THIRD DEGREE SEXUAL ASSAULT. Whoever has sexual intercourse with a person without the consent of that person is guilty of a Class D felony.

⁶ Consent is not an element to the crime of first-degree sexual assault with a child. Section 948.02(1), STATS.; *State v. Harrell*, 182 Wis.2d 408, 416, 513 N.W.2d 676, 679.

for the purposes of “sexual advancement” did not comport with the fact that Tiffany entered his car voluntarily. Smith's trial lawyer also testified that he explained to Smith that the age prerequisite in the enticement charge also did not jibe with the facts: “I said this child has not reached the age of -- is over the age of sixteen -- she's sixteen -- but the charge involves somebody who has not reached the age of sixteen.” Smith's trial lawyer testified that he also explained to Smith that “there is well established case law in the State of Wisconsin that if there is a plea agreement, then it doesn't have to fit it to a tee.” [Sic]

The trial court believed the lawyer's testimony. The trial court's finding that Smith's plea was knowing, intelligent, and voluntary is not clearly erroneous. See RULE 805.17(2), STATS. (trial court's findings of fact shall not be set aside on appeal unless clearly erroneous) (made applicable to criminal proceedings by § 972.11(1), STATS.). Smith knowingly, intelligently, and voluntarily entered an *Alford*-type plea to a charge to which he not only claimed innocence, but to a charge that he knew *could not be proved*. *Garcia* requires that we hold that his claim of innocence asserted both before the trial court and on appeal does not constitute a “manifest injustice.” Further, it is not disputed that there is a factual basis for the original charge of second-degree sexual assault under § 940.225(2), STATS., and that this crime is “reasonably related,” *Harrell*, 182 Wis.2d at 419, 513 N.W.2d at 680, to the charge to which Smith entered his *Alford*-type plea.⁷ *Harrell* requires that we reject his “factual basis” challenge to the charge as well. Smith has not demonstrated that withdrawal of his plea was necessary to correct a manifest injustice.⁸

⁷ Although *Harrell* opined that, as we have already noted, that a voluntary and knowing plea will withstand attack on appeal if there is a factual basis “for either the offense to which the plea is offered or to a more serious charge reasonably related to the offense to which the plea is offered,” *id.*, 182 Wis.2d at 419, 513 N.W.2d at 680, and Smith argues that the two crimes here were both ten-year felonies and thus one was not more “serious” than the other, we do not see *Harrell*'s use of the word “serious” as requiring reversal here. First, in Smith's mind, the second-degree sexual assault charge was “more serious” than the enticement charge, in the sense that he preferred to plead to the latter rather than to the former, even though the potential punishment was the same for both. Second, we do not perceive *Harrell* to establish a requirement that the plea-bargained charge carry a lesser penalty than the original charge, although that will almost always be the case for obvious reasons.

⁸ Wholly ignoring *Harrell*, the dissent characterizes this result as a “charade.” The result, however, is compelled by *Garcia*'s acceptance of expediency-based plea bargaining and the

By the Court.—Judgment and order affirmed.

Publication in the official reports is recommended.

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“charade,” to use the dissent's term, of convicting without trial those who protest their innocence, which *Garcia* has sanctioned. Indeed, other states, in their zeal to embrace plea bargaining, have also permitted pleas to “crimes” that were legally impossible. See, e.g., *Downer v. State*, 543 A.2d 309, 312–313 (Del. 1988); *Hoover v. State*, 530 So.2d 308 (Fla. 1988); *People v. Waits*, 695 P.2d 1176, 1178–1179 (Colo. Ct. App. 1984), *rev'd in part on other grounds*, 724 P.2d 1329 (Colo. 1986) (*en banc*); *People v. Genes*, 227 N.W.2d 241, 243 (Mich. Ct. App. 1975) (alternate holding); *People v. Foster*, 225 N.E.2d 200, 201–202 (N.Y. 1967). The result we reach here, and the results reached in *Downer*, *Hoover*, *Waits*, *Genes*, and *Foster*, are but natural consequences of a system that encourages plea bargaining and thus permits spree-criminals to get away with multiple armed robberies, multiple burglaries, and even multiple rapes. In the words of former federal judge and prosecutor Herbert J. Stern, plea bargaining has made our courts of justice a “fish market” that “ought to be hosed down.” Herbert J. Stern, Book Review, 82 COLUM. L. REV. 1275, 1283 (1982).

SULLIVAN, J. (*concurring*). I grudgingly agree with the conclusion reached in the majority opinion: George Smith “has not demonstrated that withdrawal of his plea was necessary to correct a manifest injustice.” Majority slip op. at 11. I write separately, however, because I have difficulty concluding that the Wisconsin Supreme Court “has now wholly and unequivocally embraced the practice [of plea agreements]” – in all cases. Majority slip op. at 6. As the majority opinion suggests, recent Wisconsin cases have drifted down a slippery slope – allowing widening factual disparity between the “reality” of the offense charged, and the “fiction” of the negotiated plea. I tentatively conclude that this widening disparity could envelop such legal impossibilities as that present in the case at bar, that is, where the crimes are “reasonably related.” See majority slip op. at 11 (citation omitted). Without further guidance from the supreme court, however, I cannot fathom the ultimate limit to which this disparity should expand.

I do not believe that the supreme court has paved such a smooth path in *State v. Garcia*, ___ Wis.2d ___, 532 N.W.2d 111 (1995), that trial courts should view all such legal impossibilities created during plea negotiations as mere “speed bumps” on the road to an allegedly more efficient criminal justice system. Nor do I conclude, however, as the dissent seemingly does, that the mere acceptance of a legally “impossible” plea creates an unconscionable detour away from the just resolution of the case. See dissent slip op. at 4. Accordingly, after further consideration, I believe this case would have been appropriate for certification to the supreme court.

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SCHUDSON, J. (*dissenting*). The trial court found George Smith guilty despite the fact that the “crime” to which he pled was a legal impossibility, and despite the fact that Smith maintained his innocence. *Must* we affirm such a charade?

As the majority notes, “the record is not only devoid of a factual basis for an element of the crime to which the defendant pled, but, based on the facts, the crime is also a legal impossibility.” Majority slip op. at 9. Nevertheless, the author of the majority opinion concludes that misguided precedents require that we affirm such legally impossible plea agreements because the Wisconsin Supreme Court “has now wholly and unequivocally embraced the practice [of plea bargaining].” *See* majority slip op. at 6. Judge Sullivan, concurring, and I do not conclude, however, that the supreme court has done so.

Although I understand the majority's discomfort with the appellate decisions that would seem to acquiesce in trial court decisions to approve almost any plea agreement, I do not read them to *require* our affirmance of plea agreements in which there is neither an admission of guilt nor a factual basis establishing the crime to which the defendant pled.

We recently explained:

Establishment of a factual basis for a plea to the charged crime is separate and distinct from the requirement that the voluntariness of the plea be established to the trial court's satisfaction. In addition to establishing that the plea is voluntarily and understandingly entered, the trial court must, before accepting it, “personally determine that the conduct which the defendant admits constitutes the offense ... to which the defendant has pleaded guilty.” And the “failure of the trial court to establish a factual basis showing that the conduct which the defendant admits constitutes the offense ... to which the defendant pleads, is evidence that a

manifest injustice has occurred,” warranting withdrawal of the plea.

State v. Harrington, 181 Wis.2d 985, 989, 512 N.W.2d 261, 263 (Ct. App. 1994) (citations omitted; ellipses in *Harrington*). When defendants plead guilty, trial courts must apply this standard. When, despite defendants' claims of innocence, trial courts choose to indulge the legal fiction of *Alford* pleas, they should apply an equally rigorous standard to assure justice. I read nothing in our case law to require our acquiescence to the double-deceit of an *Alford* plea to a legally impossible offense.

As I have repeatedly emphasized, although *Alford* pleas are lawful, they also are unconscionable. The fact that “in Wisconsin a trial court *can* accept an *Alford* plea,” see *State v. Johnson*, 105 Wis.2d 657, 663, 314 N.W.2d 897, 900 (Ct. App. 1981) (emphasis added), does not mean that a trial court should do so or that an appellate court should approve.

The frequently heard explanation for *Alford* pleas is that, without them, defendants would not plead guilty and cases would go to trial unnecessarily. Even if that were so, it would be a pathetic excuse for their use. That explanation, however, is little more than a rationalization. It finds no support among those wise judges who reject *Alford* pleas.

When a court rejects an *Alford* plea, only in a very few cases will a trial follow – and often rightfully so! As a result of such trials, some defendants are properly acquitted; others are convicted of the correct, original charges. In a few other cases, rejection of an *Alford* plea leads the prosecution to evaluate its case more carefully and, sometimes, to move for dismissal or appropriate amendment based on the evidence.

In most cases, however, when a trial court rejects an *Alford* plea, the defendant reconsiders and pleads guilty, admitting the crime. That admission often is essential to the defendant's rehabilitation, the victim's sense of justice, and the community's perception of fairness. Further, trial judges discover that by rejecting *Alford* pleas they often can provide more intelligent sentencing, uncompromised by a defendant's protests of innocence.

Those who think *Alford* pleas produce efficiency for the criminal justice system should again taste the proof of this unsavory pudding. Smith allegedly committed a sexual assault on December 7, 1993. He came to the trial court for a plea on February 22, 1994. His case continues on appeal more than a year later precisely because of the *Alford* charade. See *State v. Garcia*, ___ Wis.2d ___, ___ n.2, 532 N.W.2d 111, 120 n.2 (1995) (Wilcox, J., concurring) ("*Alford* pleas are not always an expedient in the criminal judicial process.").

After sentencing, a defendant must demonstrate that a "manifest injustice" requires withdrawal of a plea. *State v. Truman*, 187 Wis.2d 622, 625, 523 N.W.2d 177, 178 (Ct. App. 1994). "The 'manifest injustice' test is rooted in concepts of constitutional dimension, requiring the showing of a serious flaw in the fundamental integrity of the plea." *State v. Nawrocke*, No. 94-2900-CR, slip op. at 5 (Wis. Ct. App. April 4, 1995, ordered published May 30, 1995). In this case was there a serious flaw? —there was no admission, no factual basis, no legally possible crime. No manifest injustice? —that makes no sense. Accordingly, I respectfully dissent.⁹

⁹ Judge Fine's final rejoinder, see footnote 8 of the majority opinion, requires a reply.

I have not characterized this appellate "result" as a charade; I have characterized this double-deceit plea bargain as a charade. I acknowledge that whether, on appeal, we *must* affirm this

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double-deceit plea bargain presents a close legal issue. Although Judge Fine's conclusion that the case law compels us to do so is tenable, I reach a different conclusion. Judge Sullivan also departs somewhat from Judge Fine's interpretation of the supreme court's decisions. Such differences of opinion are open, respectful, and, I hope, helpful in clarifying issues for resolution in the future.

Judge Fine and I have always been among Wisconsin's most determined, judicial critics of the virtually automatic, "grease-the-wheels-of-the-system" plea bargaining in many courts. Indeed, during our many years as trial judges, Judge Fine and I were often viewed as the two judges in Milwaukee's juvenile and criminal courts who were most likely to reject plea bargains and who consistently rejected *Alford* pleas. Thus, I sense the frustration he must feel in affirming the double-deceit plea bargain in this case. I do not agree, however, that the case law compels affirmance of this charade.